No. 922

FILED
FEB 5 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

3244 S #2

ATLANTIC COMPANY,

Petitioner,

vs.

ATL-BRO

A. BROUGHTON, et al

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No.....

ATLANTIC COMPANY,

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vs.

A. BROUGHTON, CLIFFORD BURDETT, CLAUD COOPER, ASBURY CRITTLE, WILLIAM HANKS, JAMES JACKSON, L. P. KELLY, RUFUS McCRARY, ROY REESE, HARVEY ROLAND, FRED WHEELER CLEVELAND HARRIS, CLARENCE MALLORY, ELCO SMITH, ROY TRIBBLE, JAMES TOBIE SMITH AND WILLIE PITTS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Atlantic Company, defendant in the District

Court, appellant and cross-appellee in said Circuit Court of Appeals, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered on December 4, 1944 in the above cause, affirming the judgment of the District Court of the United States for the Northern District of Georgia entered on March 13, 1944.

OPINIONS BELOW

The opinion of the District Court is reported in 54 Fed. Sup. 185, and is also printed in the Record (R. 170-7). The majority opinion of the Circuit Court of Appeals and the dissenting opinion of Judge Waller, as yet un-reported, are printed in the record. (R. 196-204).

BASIS OF JURISDICTION

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (28 U.S.C. 347-a).

The opinion of the Circuit Court of Appeals for the Fifth Circuit was filed December 4, 1944; petition for rehearing was filed December 22, 1944, and was denied January 5, 1945. Application for stay of mandate pending this petition for certiorari was made and order staying the mandate for thirty days was entered January 10, 1945.

QUESTION PRESENTED

The question presented is:

When a bona fide dispute exists between employer and employees as to unpaid minimum wages and overtime compensation claimed under the Fair Labor Standards Act of 1938, (29 U.S.C. 201, et seq.) the dispute relating entirely to past transactions and involving both a question of law as to whether the work done by the employees brings them within the coverage of the Act, and also a question of fact as to the number of overtime hours worked by the employees, may the parties, in order to avoid litigation, settle their differences by a bona fide agreement of accord and satisfaction?

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act of 1938 (29 U.S.C., Sections 201 et seq.). Pertinent provisions thereof are set out in the appendix.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Respondents, employees and former employees of petitioner, made claims for unpaid minimum wages and overtime compensation under the Fair Labor Standards Act of 1938. Most of the claimants had been employed in the manufacture, handling and sale in Atlanta, Georgia of ice, some of which was used for the refrigeration of railroad cars moving in interstate commerce. When these claims were made and when they were settled, as hereinafter related, petitioner was in good faith contesting with the Administrator of the Wage-Hour Division of the Department of Labor the application and coverage of the Act to this part of its business, and the question was undetermined. (R. 109). Believing that these employees were not within the coverage of the Act, petitioner did not keep the detailed records of hours worked as provided by the Act, and when these claims were made several years later, neither employ-

er nor employees knew the number of overtime hours, but most of the employees made claim for sums far in excess of what later appeared from the best estimate that could then be made of what would have been due them if they were entitld to the benefits of the Act. (R. 109-111).

Petitioner denied all liability on the ground that the nature of the work done by the employees did not entitle them to the benefits of the Act, and further contended that even if the Act was applicable to these employees, they had not worked as many overtime hours as they claimed. (R. 99-109-111). Almost all of the employees had placed their claims in the hands of attorneys who were pressing for settlements. In an effort to avoid litigation, the claims were in good faith settled by written agreements. Where claimants were represented by counsel —and most of them were—the settlements were made through and approved in writing by the attorney. (R. 127-135). Substantial amounts were paid as the consideration for these agreements, and thirteen of the original plaintiffs in these cases were paid considerably more than was actually due them. (R. 125-126). Afterwards, the respondents repudiated their agreements, and without returning or tendering the amounts received under the settlement contracts, and with the attorney who negotiated and approved these agreements as leading counsel, instituted this litigation.

Respondents set up the agreements of accord and satisfaction as a bar to the claims. A jury trial was demanded. (R. 15-17).

The Court charged the jury that if a bona fide dispute existed between the parties and it was in good faith settled as recited in the agreements of accord and satisfaction, that these agreements would bar a recovery for the plaintiffs. (R. 160). The jury was unable to agree and a mistrial was declared. Later the

District Judge granted respondents motion for judgment, holding that regardless of the parties' desire to adjust a bona fide dispute between themselves without litigation, any settlement of a claim for unpaid minimum wages and overtime compensation under the Fair Labor Standards Act was not binding as contrary to public policy. (R. 170-177). The Circuit Court of Appeals for the Fifth Circuit affirmed this decision, Judge Waller dissenting. (R. 196).

REASONS FOR GRANTING THE WRIT

1. The Court below has decided an important question of Federal law which should be decided by this Court.

2. The writ should be allowed in order that this Court may settle a much litigated question of importance in the administration of the Fair Labor Standards Act wherein the decisions of the United States Courts of Appeal and various state courts are in hopeless conflict. The decision of the United States Circuit Court of Appeals in this case is in direct conflict with the decision of the Court of Appeals of Georgia, a state court of last resort, in the case of David vs. Atlantic Company, 69 Ga. App. 643; 26 S.E. (2d) 650. The several Circuit Courts of Appeal entertain views which conflict in one way or another with each other. See Fleming vs. Warshawsky (7 C.C.A.) 123 Fed. (2d) 622; Guess vs. Montague (4 C.C.A.) 140 Fed. (2d) 500; Rigopoulos vs. Kervan (2 C.C.A.) 140 Fed. (2d) 506.

The Fair Labor Standards Act has national application and is fruitful of litigation throughout the nation in both State and Federal courts, and unless this Court finally determines the public policy underlying that Act with respect to the bona fide settlement of disputes, agreements made by the parties effecting such settlements which are accepted as legal and enforceable in some jurisdictions will be held to be void and unenforceable

in other jurisdictions. Much confusion has already arisen and can only be settled by an authoritative pronouncement from this Court on the question.

3. The Court below has decided a Federal question in conflict with the applicable decisions of this Court, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

4. A special and important reason why the writ should be granted is the uniform practice of trial courts and the Wage-Hour administrator to encourage and approve the settlement of controversies arising under the Fair Labor Standards Act. An authoritative pronouncement should be made so that this practice may be discontinued if illegal.

WHEREFORE, it is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this Court, and that the writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1.

THE IMPORTANCE OF THE QUESTION IN THE ADMINISTRATION OF THE FAIR LABOR STANDARDS ACT.

A special and important reason why the writ should be granted in this case is in order that this court may settle a much litigated question of importance in the administration of the Fair Labor Standards Act. The question here presented is broader than the questions presented in Brooklyn Savings Bank vs. O'Neil, No. 445, and in Dize vs. Maddrix, No. 554, now before this court. Here is presented a comprehensive question, the answer to which will furnish positive guidance to the courts and the administrator in all cases. Here there was a bona fide dispute both of law and of fact, and the parties, choosing to settle rather than to litigate, made agreements of accord and satisfaction for reasonable and substantial yet arbitrary amounts. Some original plaintiffs were paid more than they could have recovered under the Act. They voluntarily dismissed their actions. Others were paid less. They repudiated their contracts and sued.

It is the uniform practice of all trial courts, so far as we are informed, to permit and approve the settlement of cases when bona fide disputes exist. Some courts indeed even suggest and encourage settlements to the points of insistence. The administrator apparently also aids in the making of compromise adjustments. See Rigopoulos vs. Kervan, 140 Fed. (2d) 506-508; 1939 Wage-Hour Division Annual Report, pages 60-61; 1940 Report pages 87-90.

See also the dissenting opinion of Judge Waller (R. 203).

It is important to the hundreds of thousands of employers and employees subject to the Act and to the courts where thousands of these cases are pending that an authoritative pronouncement be made on the question presented, in order that they may know if fair and reasonable settlements may be made where there is an honest controversy, or if every case must be litigated to a conclusion.

2.

THE LAW AND PUBLIC POLICY FAVOR SETTLEMENT OF DOUBTFUL CLAIMS

The policy of the law is to encourage settlements and to discourage parties from resorting to litigation. The courts support agreements as far as legally possible which have for their object the peaceful settlement of doubtful rights, and anything that prevents the compromise of claims encourages litigation and is contrary to public policy. C.M.&St.P. vs. Clark, 178 U.S. 353; Bofinger vs. Tuyes, 120 U.S. 198; Re: Prudence Co. 98 Fed. (2d) 559; Kehoe vs. Commissioner, 105 Fed. (2d) 552; 11 Am.Jur. 249.

> "Decisions * * * by this court * * * show beyond all doubt that parties may adjust their own controversies in their own way, and that when they do so voluntarily, and with full knowledge of their rights and all the circumstances, no appeal lies to the courts to review their mutual decision. Courts cannot make contracts for parties; and if parties understandingly contract to adjust a controversy between them in a particular way, and actually execute the contract, they are both bound to regard the controversy as at an end." (Savage vs. United States, 92 U.S. 382, 388-389).

A controversy concerning a question of law alone is sufficient. St. Louis vs. U. S., 92 U.S. 462.

Any dispute which can be the subject of an action or a suit may be the basis of a compromise and its settlement will afford a consideration therefor. 11 Am. Jur. 250.

The law and public policy favor settlements and discourage litigation to so great an extent as, on occasion, to allow the settlement of minor criminal offenses, this being considered less injurious to the public interest than litigation. 3 Wharton's Criminal Law, Sec. 1877, p. 2079; Glidewell vs. Murray, 124 Va. 563; 98 S.E. 665.

3.

THE FAIR LABOR STANDARDS ACT DOES NOT EXPRESSLY NOR BY NECESSARY IMPLICATION FORBID SETTLEMENTS

The statute not only contains no provision, forbidding settlements, but was purged of such a provision before its enactment. The section so stricken which might have indicated a Congressional intent to outlaw settlements read as follows:

> Section 20 (b). Any contract, agreement, understanding, condition, stipulation, or provision binding any person to waive compliance with any provision of this Act or with any regulation or order thereunder shall be null and void."

Senate Reporter No. 844, 75th Congress, First Session, 1937. Clearly, therefore, Congress did not intend for this statute to nullify the right to compromise claims.

Had Congress intended to restrict in any way the right to settle claims under the Fair Labor Standards Act, it would have expressly stated the restrictions, just as it did in the Longshoremen's and Harbor Worker's Compensation Act. (33

U.S.C.A. 901). Here Congress expressly enacted "No assignment, release, or commutation of compensation or benefits due or payable * * * except as provided * * * shall be valid * * * ." (33 U.S.C.A. 916). The fact that a similar provision as quoted above was stricken clearly shows the Congressional intent not to affect the existing general law.

> "The Fair Labor Standards Act contains no language outlawing a settlement contract between employer and employee where the contract is based upon a bona fide dispute between them as to the facts of the employee's claim and as to the law applicable thereto." David vs. Atlantic Company, 69 Ga. App. 643; 26 S.E. (2d) 650. See also Gangi vs. D. A. Schulte, 53 Fed. Sup. 844.

4.

PUBLIC POLICY

It is contended that controversies arising under the Fair Labor Standards Act constitute an exception to the universally recognized rule not only allowing but encouraging parties to settle their controversies. It is said that this exception exists because of public policy. Public policy, however, is nothing more nor less than the policy of the law and to determine what it is, we must go to the constitution, statutes, and the decisions of the courts. It is a question of law and not of fact. 50 Corpus Juris 857.

Statutes are not to be construed as isolated fragments of law, but as parts of a connected homogeneous system. They are not to be understood as effecting changes in the common law and rules established by judicial decision beyond that which is clearly indicated by express terms or necessary implication. They are presumed to be enacted by the Legislature with full

knowledge of the existing condition of the law, and with reference thereto, and will not be construed at variance therewith unless the intention to override such rules is clearly manifested. Ross vs. Jones, 89 U.S. (22 Wall). 576-592. Globe & Rutgers vs. Draper, (9 C.C.A.) 66 Fed. (2d) 985. Swartz vs. Inspiration Gold Mining Co., 15 Fed. Sup. 1030. Scharfeld vs. Richardson, 133 Fed. (2d) 340. 59 Corpus Juris 1038.

Congress must be presumed to have legislated with the general state of the law in mind. If it had intended to make a drastic departure from traditional legal principles, an express statement to this effect would have been made. The elimination of Section 20 (b), quoted above, is the highest evidence of the Congressional intent not to disturb the general law regarding settlements. Hecht Co. vs. Bowles, 321 U. S. 321-329. Scripps-Howard vs. Commissioner, 316 U. S. 4-13, et seq.

The right of private contract is one of the greatest liberties enjoyed by a citizen, and the most important function of courts is to maintain and enforce contracts rather than to enable parties to escape from their obligations on the pretext of public policy. 12 Am. Jur. 670.

It is the inherent and inalienable right of every man freely to deal or refuse to deal with his fellow man. Competent persons ordinarily have the utmost liberty of contracting, and their agreements voluntarily and fairly made will be held valid and enforced in the courts. 12 Am. Jur. 641.

It is inconceivable that Congress in enacting the Fair Labor Standards Act meant to repeal the equitable defense of estoppel, the common law defenses of accord and satisfaction, and of res adjudicata, and the statutory defense of limitations. Estoppel has been held a valid defense under the Fair Labor Standards Act. Mortenson v. Western Light & Telephone Co., 42 Fed. Sup.

319. Cotton vs. Weyerhauser, 147 Pac. (2d) 299. Res adjuticata is a valid defense. D. & L. Production Company vs. Cuniff, 8 L.C. 62,312.

There is no limitation in the Fair Labor Standards Act on claims arising thereunder, and yet the courts uniformly hold that the statutes of limitation of the several states apply. Loggins vs. Steel Construction Company (C.C.A. 5) 129 Fed. (2d) 118. Duncan vs. Montgomery Ward, 42 Fed. Sup. 879. Klotz vs. Ippolito, 40 Fed. Sup. 422. Abram vs. San Joaquin Cotton Oil Co., 46 Fed. Sup. 969.

All courts which have passed on the question have held that the statutes of limitation of the several states apply to claims under the Fair Labor Standards Act. These statutes are nothing more nor less than the public policy of the several states in the interest of repose to prohibit the litigation of stale demands. If, therefore, the public policy of each state is to be enforced in this respect, a fortiori, the public policy of *all* states and the Federal Government to encourage the peaceful settlement of claims by agreements of accord and satisfaction will likewise be enforced.

5.

SETTLEMENT OF CLAIMS ARISING UNDER OTHER STATUTES INVOLVING PUBLIC POLICY ARE VALID

The underlying philosophy and legal effect of the decision in this case is in conflict with the doctrine that settlement of controversies should be encouraged and is in conflict with the application of that doctrine to many statutes involving public policy.

SHERMAN ANTI-TRUST LAW

No distinction can be drawn either in the spirit, principle or

verbiage of the Fair Labor Standards Act and the Sherman Anti-Trust Law. The latter Act declares that every contract in restraint of interstate commerce is illegal, and that any person injured by reason of anything forbidden by that law "*shall recover* threefold the damages by him sustained; and the costs of suit, including a reasonable attorney's fee." (Emphasis supplied.) 15 U.S.C.A. Sections 1 to 15.

Section 6 of the Fair Labor Standards Act provides that "Every employee *shall pay* to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates * * * ."

The Anti-Trust Laws are as much affected with the public interest as is the Fair Labor Standards Act, and yet agreements of accord and satisfaction in settlement of disputed claims under the Anti-Trust Law have uniformly been held valid. Radio Corporation vs. Raytheon Co. 296 U.S. 459. Clabaugh vs. Southern Wholesale Grocers Association (C.C.A. 5) 181 Fed. 706. Westmoreland Asbestos Co., Inc., vs. Johns-Manville Corporation, 39 Fed. Sup. 117.

USURY STATUTES

Usury statutes are affected with public policy. Yet it is uniformly held that there may be an accord and satisfaction of the right of action for usury paid even though the sum advanced on such an agreement is less than the usury received, where there is a bona fide controversy between the parties. 15 C.J.S. 715. Rogers vs. Ball, 54 Ga. 15. Parker vs. Fulton Loan, 46 Ga. 166.

MERCHANT MARINE ACT

For reasons of public policy seamen are the special wards of the Courts of Admiralty, and their rights under the Merchant Marine Act are likewise affected with public policy. Yet they

may release claims for liability for personal injuries arising under the Act. Garrett vs. Moore-McCormick, 317 U.S. 239; The S. S. Standard, 103 Fed. (2d) 437.

FEDERAL EMPLOYER'S LIABILITY ACT

Settlements are uniformly recognized under the Federal Employer's Liability Act, which is a statute involving public policy. Mellon vs. Goodyear, 277 U.S. 335; Flynn vs. Railroad Co. 283 U.S. 53.

WORKMEN'S COMPENSATION ACTS

The Workmen's Compensation Acts of the several states either expressly or impliedly permit the injured employee and the employer to enter into private agreement as regards the compensation to which the employee is entitled, and such agreements are encouraged by the Courts. 71 Corpus Juris 933.

6.

BONA FIDE SETTLEMENTS UNDER THE FAIR LABOR STANDARDS ACT ARE VALID

In David vs. Atlantic Company, 69 Ga. App. 643; 26 S.E. (2d) 650, the Georgia court sustained the validity of a contract of accord and satisfaction identical with that now before the court. In Gangi vs. Schulte, 53 Fed. Sup. 844, the District Court for the Southern District of New York said: "It is my own view that there is no conflict between the public policy of the statute and the *equally well established policy of the law to encourage the amicable adjustment of disputes by arms-length negotiation.* I find nothing in the statute which prohibits the settlement of such a past due claim, especially if the amount paid in settlement is at least equal to the unpaid overtime com-

pensation." (Emphasis supplied). See also Sissel vs. Great Atlantic & Pacific Tea Company, 37 Fed. Sup. 913.

7.

CASES RELIED ON BY RESPONDENTS DISTINGUISHED

The only authorities cited in the majority opinion are: Tennessee Coal Co. vs. Muscoda Local, 321 U.S. 590; Guess vs. Montague, 140 Fed. (2d) 500; Seneca Coal & Coke Co. vs. Lofton, 136 Fed. (2d) 359; Overnight Motor Company vs. Missell, 316 U.S. 572. None of the authorities cited support the ruling made. The Tennessee Coal case involved only the question of "portal to portal" pay; the Overnight Motor case dealt only with the right to overtime of an employee working irregular hours; and in Guess vs. Montague, and the Seneca Coal case, there was no question of a bona fide controversy between the parties.

In some of the cases on which respondents rely will be found isolated comments and dicta which, taken alone, appear to give some support to their contentions, but when these cases are considered in their entirety the distinction is obvious. On careful examination, it will be found that in none of them was there a bona fide controversy of law and fact existing between the parties. Though, as petitioner contends, no Circuit Court has decided the exact question here presented, the decisions dealing with the defense of accord and satisfaction under the Fair Labor Standards Act are conflicting and confusing.

> "As to the appellants claim of accord and satisfaction, we are not now required to choose between the conflicting view of other Circuit Courts of Appeal. See Fleming vs. Warshawsky & Co. 7 Cir. 123 Fed. 2d 622; Guess vs. Montague, 4 Cir., Sept. 16, 1943, 140 Fed. 2d 500." Rigopoulos vs. Kervan, 140 Fed. 2d 506-507-8.

In Rigopoulos vs. Kervan, 47 Fed. Sup. 576, the District Court struck a plea of accord and satisfaction, stating that *no facts were pleaded to show an honest dispute between the parties, and that in the absence of such allegation, the defense of accord and satisfaction was insufficient.* On appeal, the Circuit Court in the decision reported in 140 Fed. (2d) 506 affirmed the trial court and said "There was nothing in dispute between the parties at the time the defendant made his payments; hence there was no consideration for an accord even at common law."

In Fleming vs. Warshawsky, (C.C.A. 7) 123 Fed. (2d) 622, it appears that the administrator and the defendant stipulated to enter a consent judgment enjoining the defendant from violations and providing that he should pay his employees certain amounts. The defendant company failed to comply and was cited for contempt and defended the contempt action on the ground that "without solicitation or other effort on their part, or any one authorized by them in that behalf, certain employees * * * voluntarily and without coercion relinquished their said claims." Here, then, the employees simply signed a voluntary waiver or release upon no consideration whatever and without any controversy existing.

Likewise, in Guess vs. Montague (C.C.A. 4) 140 Fed. (2d) 500, it affirmatively appears that there was no bona fide dispute. The court said (p. 505) "These plaintiffs had two claims, one for the balance of the minimum wages and overtime compensation fixed by law, the other for liquidated damages in a like amount. There was doubt in the mind of the defendant as to his liability for either and *plaintiffs were not then even claiming that he was liable for either.*" (Emphasis supplied)

In Birbalas vs. Cuneo Printing Industries, Inc. (C.C.A. 7) 140 Fed. (2d) 826, the court expressly stated that there was no evidence of an existing bona fide dispute.

CONCLUSION

That the question be answered authoritatively is important to the public. It is important to business generally and especially to that ever increasing part of the business world engaged in interstate commerce or the production of goods therefor.

It is important to the Courts and to the Administrator of the Wage-Hour Division of the Department of Labor. They should know whether they may lawfully permit honest settlements when both litigants want to settle or if they must require every disputed claim to be litigated to final judgment.

Most of all, it is important in the interest of fair and honest dealing and the public morals. Shall contracts continue to be binding or have they become only "scraps of paper"? Was it the intention of Congress "to drive so wide a breach between law and morals"? Gangi v. Schulte, supra.

All concerned — and they are many — should know the answer.

WHEREFORE, it is respectfully submitted that the petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted.

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APPENDIX

Pertinent provisions of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, 29 U.S.C. Section 201, et seq.) read as follows:

"Sec. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates * * * "

"Sec. 7 (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section, * * *

unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed.

"Sec. 16 (b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situ-

ated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No.....

ATLANTIC COMPANY,

Petitioner,

vs.

EMANUEL CARTHAN, MONROE CHAPPELL, WATTS DIXON, JOSEPH DANIEL, ALTON FREEMAN, JUNIOUS GRANT, R. L. JACKSON, JABE MALCOM, EDDIE PRESTON, ALBERT RUSSELL, ELIJAH VAUGHN, MOSSER WILLIAMS, WILLIAM BAILEY, GEORGE BARNES, LAWSON BRYANT, CHARLIE CHEELEY, SAM DAVIS, CLAUD GARY, CEPHUS HUNTER, HOMER JACKSON, JOHN HENRY MOORE, ROY C. PENDLEY, LOVE ROLAND, ALBERT SMITH, JOE BRADY SMITH, WALTER TAYLOR AND JOE TURNER,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Atlantic Company, defendant in the District

Court, appellant and cross-appellee in said Circuit Court of Appeals, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered on December 4, 1944 in the above cause, affirming the judgment of the District Court of the United States for the Northern District of Georgia entered on March 13, 1944.

OPINIONS BELOW

The opinion of the District Court is reported in 54 Fed. Sup. 185, and is also printed in the Record (R. 170-7.)* The majority opinion of the Circuit Court of Appeals and the dissenting opinion of Judge Waller, as yet un-reported, are printed in the record. (R. 196-204).

BASIS OF JURISDICTION

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (28 U.S.C. 347-a).

The opinion of the Circuit Court of Appeals for the Fifth Circuit was filed December 4, 1944; petition for rehearing was filed December 22, 1944, and was denied January 5, 1945. Application for stay of mandate pending this petition for certiorari was made and order staying the mandate for thirty days was entered January 10, 1945.

QUESTION PRESENTED

The question presented is:

* The same questions of law and fact were involved in this case and the case of *Broughton* vs. *Atlantic Company*, and the cases were tried together in the District Court and by stipulation consolidated on appeal for hearing, briefs, argument, decision and record, and the record references made in this petition and brief refer to the record in the Broughton case.

When a bona fide dispute exists between employer and employees as to unpaid minimum wages and overtime compensation claimed under the Fair Labor Standards Act of 1938, (29 U.S.C. 201, et seq.) the dispute relating entirely to past transactions and involving both a question of law as to whether the work done by the employees brings them within the coverage of the Act, and also a question of fact as to the number of overtime hours worked by the employees, may the parties, in order to avoid litigation, settle their differences by a bona fide agreement of accord and satisfaction?

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act of 1938 (29 U.S.C., Sections 201 et seq.). Pertinent provisions thereof are set out in the appendix.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Respondents, employees and former employees of petitioner, made claims for unpaid minimum wages and overtime compensation under the Fair Labor Standards Act of 1938. Most of the claimants had been employed in the manufacture, handling and sale in Atlanta, Georgia of ice, some of which was used for the refrigeration of railroad cars moving in interstate commerce. When these claims were made and when they were settled, as hereinafter related, petitioner was in good faith contesting with the Administrator of the Wage-Hour Division of the Department of Labor the application and coverage of the Act to this part of its business, and the question was undetermined. (R. 109). Believing that these employees were not within the coverage of the Act, petitioner did not keep the detailed records of hours worked as provided by the Act, and when these claims were made several years later, neither employ-

er nor employees knew the number of overtime hours, but most of the employees made claim for sums far in excess of what later appeared from the best estimate that could then be made of what would have been due them if they were entitld to the benefits of the Act. (R. 109-111).

Petitioner denied all liability on the ground that the nature of the work done by the employees did not entitle them to the benefits of the Act, and further contended that even if the Act was applicable to these employees, they had not worked as many overtime hours as they claimed. (R. 99-109-111). Almost all of the employees had placed their claims in the hands of attorneys who were pressing for settlements. In an effort to avoid litigation, the claims were in good faith settled by written agreements. Where claimants were represented by counsel —and most of them were—the settlements were made through and approved in writing by the attorney. (R. 127-135). Substantial amounts were paid as the consideration for these agreements, and thirteen of the original plaintiffs in these cases were paid considerably more than was actually due them. (R. 125-126). Afterwards, the respondents repudiated their agreements, and without returning or tendering the amounts received under the settlement contracts, and with the attorney who negotiated and approved these agreements as leading counsel, instituted this litigation.

Respondents set up the agreements of accord and satisfaction as a bar to the claims. A jury trial was demanded. (R. 15-17).

The Court charged the jury that if a bona fide dispute existed between the parties and it was in good faith settled as recited in the agreements of accord and satisfaction, that these agreements would bar a recovery for the plaintiffs. (R. 160). The jury was unable to agree and a mistrial was declared. Later the

District Judge granted respondents motion for judgment, holding that regardless of the parties' desire to adjust a bona fide dispute between themselves without litigation, any settlement of a claim for unpaid minimum wages and overtime compensation under the Fair Labor Standards Act was not binding as contrary to public policy. (R. 170-177). The Circuit Court of Appeals for the Fifth Circuit affirmed this decision, Judge Waller dissenting. (R. 196).

REASONS FOR GRANTING THE WRIT

1. The Court below has decided an important question of Federal law which should be decided by this Court.

2. The writ should be allowed in order that this Court may settle a much litigated question of importance in the administration of the Fair Labor Standards Act wherein the decisions of the United States Courts of Appeal and various state courts are in hopeless conflict. The decision of the United States Circuit Court of Appeals in this case is in direct conflict with the decision of the Court of Appeals of Georgia, a state court of last resort, in the case of David vs. Atlantic Company, 69 Ga. App. 643; 26 S.E. (2d) 650. The several Circuit Courts of Appeal entertain views which conflict in one way or another with each other. See Fleming vs. Warshawsky (7 C.C.A.) 123 Fed. (2d) 622; Guess vs. Montague (4 C.C.A.) 140 Fed. (2d) 500; Rigopoulos vs. Kervan (2 C.C.A.) 140 Fed. (2d) 506.

The Fair Labor Standards Act has national application and is fruitful of litigation throughout the nation in both State and Federal courts, and unless this Court finally determines the public policy underlying that Act with respect to the bona fide settlement of disputes, agreements made by the parties effecting such settlements which are accepted as legal and enforceable in some jurisdictions will be held to be void and unenforceable

in other jurisdictions. Much confusion has already arisen and can only be settled by an authoritative pronouncement from this Court on the question.

3. The Court below has decided a Federal question in conflict with the applicable decisions of this Court, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

4. A special and important reason why the writ should be granted is the uniform practice of trial courts and the Wage-Hour administrator to encourage and approve the settlement of controversies arising under the Fair Labor Standards Act. An authoritative pronouncement should be made so that this practice may be discontinued if illegal.

WHEREFORE, it is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this Court, and that the writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1.

THE IMPORTANCE OF THE QUESTION IN THE ADMINISTRATION OF THE FAIR LABOR STANDARDS ACT.

A special and important reason why the writ should be granted in this case is in order that this court may settle a much litigated question of importance in the administration of the Fair Labor Standards Act. The question here presented is broader than the questions presented in Brooklyn Savings Bank vs. O'Neil, No. 445, and in Dize vs. Maddrix, No. 554, now before this court. Here is presented a comprehensive question, the answer to which will furnish positive guidance to the courts and the administrator in all cases. Here there was a bona fide dispute both of law and of fact, and the parties, choosing to settle rather than to litigate, made agreements of accord and satisfaction for reasonable and substantial yet arbitrary amounts. Some original plaintiffs were paid more than they could have recovered under the Act. They voluntarily dismissed their actions. Others were paid less. They repudiated their contracts and sued.

It is the uniform practice of all trial courts, so far as we are informed, to permit and approve the settlement of cases when bona fide disputes exist. Some courts indeed even suggest and encourage settlements to the points of insistence. The administrator apparently also aids in the making of compromise adjustments. See Rigopoulos vs. Kervan, 140 Fed. (2d) 506-508; 1939 Wage-Hour Division Annual Report, pages 60-61; 1940 Report pages 87-90.

See also the dissenting opinion of Judge Waller (R. 203).

It is important to the hundreds of thousands of employers and employees subject to the Act and to the courts where thousands of these cases are pending that an authoritative pronouncement be made on the question presented, in order that they may know if fair and reasonable settlements may be made where there is an honest controversy, or if every case must be litigated to a conclusion.

2.

THE LAW AND PUBLIC POLICY FAVOR SETTLEMENT OF DOUBTFUL CLAIMS

The policy of the law is to encourage settlements and to discourage parties from resorting to litigation. The courts support agreements as far as legally possible which have for their object the peaceful settlement of doubtful rights, and anything that prevents the compromise of claims encourages litigation and is contrary to public policy. C.M.&St.P. vs. Clark, 178 U.S. 353; Bofinger vs. Tuyes, 120 U.S. 198; Re: Prudence Co. 98 Fed. (2d) 559; Kehoe vs. Commissioner, 105 Fed. (2d) 552; 11 Am.Jur. 249.

> "Decisions * * * by this court * * * show beyond all doubt that parties may adjust their own controversies in their own way, and that when they do so voluntarily, and with full knowledge of their rights and all the circumstances, no appeal lies to the courts to review their mutual decision. Courts cannot make contracts for parties; and if parties understandingly contract to adjust a controversy between them in a particular way, and actually execute the contract, they are both bound to regard the controversy as at an end." (Savage vs. United States, 92 U.S. 382, 388-389).

A controversy concerning a question of law alone is sufficient. St. Louis vs. U. S., 92 U.S. 462.

Any dispute which can be the subject of an action or a suit may be the basis of a compromise and its settlement will afford a consideration therefor. 11 Am. Jur. 250.

The law and public policy favor settlements and discourage litigation to so great an extent as, on occasion, to allow the settlement of minor criminal offenses, this being considered less injurious to the public interest than litigation. 3 Wharton's Criminal Law, Sec. 1877, p. 2079; Glidewell vs. Murray, 124 Va. 563; 98 S.E. 665.

3.

THE FAIR LABOR STANDARDS ACT DOES NOT EXPRESSLY NOR BY NECESSARY IMPLICATION FORBID SETTLEMENTS

The statute not only contains no provision, forbidding settlements, but was purged of such a provision before its enactment. The section so stricken which might have indicated a Congressional intent to outlaw settlements read as follows:

> Section 20 (b). Any contract, agreement, understanding, condition, stipulation, or provision binding any person to waive compliance with any provision of this Act or with any regulation or order thereunder shall be null and void."

Senate Reporter No. 844, 75th Congress, First Session, 1937. Clearly, therefore, Congress did not intend for this statute to nullify the right to compromise claims.

Had Congress intended to restrict in any way the right to settle claims under the Fair Labor Standards Act, it would have expressly stated the restrictions, just as it did in the Longshoremen's and Harbor Worker's Compensation Act. (33

U.S.C.A. 901). Here Congress expressly enacted "No assignment, release, or commutation of compensation or benefits due or payable * * * except as provided * * * shall be valid * * * ." (33 U.S.C.A. 916). The fact that a similar provision as quoted above was stricken clearly shows the Congressional intent not to affect the existing general law.

> "The Fair Labor Standards Act contains no language outlawing a settlement contract between employer and employee where the contract is based upon a bona fide dispute between them as to the facts of the employee's claim and as to the law applicable thereto." David vs. Atlantic Company, 69 Ga. App. 643; 26 S.E. (2d) 650. See also Gangi vs. D. A. Schulte, 53 Fed. Sup. 844.

4.

PUBLIC POLICY

It is contended that controversies arising under the Fair Labor Standards Act constitute an exception to the universally recognized rule not only allowing but encouraging parties to settle their controversies. It is said that this exception exists because of public policy. Public policy, however, is nothing more nor less than the policy of the law and to determine what it is, we must go to the constitution, statutes, and the decisions of the courts. It is a question of law and not of fact. 50 Corpus Juris 857.

Statutes are not to be construed as isolated fragments of law, but as parts of a connected homogeneous system. They are not to be understood as effecting changes in the common law and rules established by judicial decision beyond that which is clearly indicated by express terms or necessary implication. They are presumed to be enacted by the Legislature with full

knowledge of the existing condition of the law, and with reference thereto, and will not be construed at variance therewith unless the intention to override such rules is clearly manifested. Ross vs. Jones, 89 U.S. (22 Wall). 576-592. Globe & Rutgers vs. Draper, (9 C.C.A.) 66 Fed. (2d) 985. Swartz vs. Inspiration Gold Mining Co., 15 Fed. Sup. 1030. Scharfeld vs. Richardson, 133 Fed. (2d) 340. 59 Corpus Juris 1038.

Congress must be presumed to have legislated with the general state of the law in mind. If it had intended to make a drastic departure from traditional legal principles, an express statement to this effect would have been made. The elimination of Section 20 (b), quoted above, is the highest evidence of the Congressional intent not to disturb the general law regarding settlements. Hecht Co. vs. Bowles, 321 U. S. 321-329. Scripps-Howard vs. Commissioner, 316 U. S. 4-13, et seq.

The right of private contract is one of the greatest liberties enjoyed by a citizen, and the most important function of courts is to maintain and enforce contracts rather than to enable parties to escape from their obligations on the pretext of public policy. 12 Am. Jur. 670.

It is the inherent and inalienable right of every man freely to deal or refuse to deal with his fellow man. Competent persons ordinarily have the utmost liberty of contracting, and their agreements voluntarily and fairly made will be held valid and enforced in the courts. 12 Am. Jur. 641.

It is inconceivable that Congress in enacting the Fair Labor Standards Act meant to repeal the equitable defense of estoppel, the common law defenses of accord and satisfaction, and of res adjudicata, and the statutory defense of limitations. Estoppel has been held a valid defense under the Fair Labor Standards Act. Mortenson v. Western Light & Telephone Co., 42 Fed. Sup.

319. Cotton vs. Weyerhauser, 147 Pac. (2d) 299. Res adjuticata is a valid defense. D. & L. Production Company vs. Cuniff, 8 L.C. 62,312.

There is no limitation in the Fair Labor Standards Act on claims arising thereunder, and yet the courts uniformly hold that the statutes of limitation of the several states apply. Loggins vs. Steel Construction Company (C.C.A. 5) 129 Fed. (2d) 118. Duncan vs. Montgomery Ward, 42 Fed. Sup. 879. Klotz vs. Ippolito, 40 Fed. Sup. 422. Abram vs. San Joaquin Cotton Oil Co., 46 Fed. Sup. 969.

All courts which have passed on the question have held that the statutes of limitation of the several states apply to claims under the Fair Labor Standards Act. These statutes are nothing more nor less than the public policy of the several states in the interest of repose to prohibit the litigation of stale demands. If, therefore, the public policy of each state is to be enforced in this respect, a fortiori, the public policy of *all* states and the Federal Government to encourage the peaceful settlement of claims by agreements of accord and satisfaction will likewise be enforced.

5.

SETTLEMENT OF CLAIMS ARISING UNDER OTHER STATUTES INVOLVING PUBLIC POLICY ARE VALID

The underlying philosophy and legal effect of the decision in this case is in conflict with the doctrine that settlement of controversies should be encouraged and is in conflict with the application of that doctrine to many statutes involving public policy.

SHERMAN ANTI-TRUST LAW

No distinction can be drawn either in the spirit, principle or

verbiage of the Fair Labor Standards Act and the Sherman Anti-Trust Law. The latter Act declares that every contract in restraint of interstate commerce is illegal, and that any person injured by reason of anything forbidden by that law "*shall recover* threefold the damages by him sustained; and the costs of suit, including a reasonable attorney's fee." (Emphasis supplied.) 15 U.S.C.A. Sections 1 to 15.

Section 6 of the Fair Labor Standards Act provides that "Every employee *shall pay* to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates * * * ."

The Anti-Trust Laws are as much affected with the public interest as is the Fair Labor Standards Act, and yet agreements of accord and satisfaction in settlement of disputed claims under the Anti-Trust Law have uniformly been held valid. Radio Corporation vs. Raytheon Co. 296 U.S. 459. Clabaugh vs. Southern Wholesale Grocers Association (C.C.A. 5) 181 Fed. 706. Westmoreland Asbestos Co., Inc., vs. Johns-Manville Corporation, 39 Fed. Sup. 117.

USURY STATUTES

Usury statutes are affected with public policy. Yet it is uniformly held that there may be an accord and satisfaction of the right of action for usury paid even though the sum advanced on such an agreement is less than the usury received, where there is a bona fide controversy between the parties. 15 C.J.S. 715. Rogers vs. Ball, 54 Ga. 15. Parker vs. Fulton Loan, 46 Ga. 166.

MERCHANT MARINE ACT

For reasons of public policy seamen are the special wards of the Courts of Admiralty, and their rights under the Merchant Marine Act are likewise affected with public policy. Yet they

may release claims for liability for personal injuries arising under the Act. Garrett vs. Moore-McCormick, 317 U.S. 239; The S. S. Standard, 103 Fed. (2d) 437.

FEDERAL EMPLOYER'S LIABILITY ACT

Settlements are uniformly recognized under the Federal Employer's Liability Act, which is a statute involving public policy. Mellon vs. Goodyear, 277 U.S. 335; Flynn vs. Railroad Co. 283 U.S. 53.

WORKMEN'S COMPENSATION ACTS

The Workmen's Compensation Acts of the several states either expressly or impliedly permit the injured employee and the employer to enter into private agreement as regards the compensation to which the employee is entitled, and such agreements are encouraged by the Courts. 71 Corpus Juris 933.

6.

BONA FIDE SETTLEMENTS UNDER THE FAIR LABOR STANDARDS ACT ARE VALID

In David vs. Atlantic Company, 69 Ga. App. 643; 26 S.E. (2d) 650, the Georgia court sustained the validity of a contract of accord and satisfaction identical with that now before the court. In Gangi vs. Schulte, 53 Fed. Sup. 844, the District Court for the Southern District of New York said: "It is my own view that there is no conflict between the public policy of the statute and the *equally well established policy of the law to encourage the amicable adjustment of disputes by arms-length negotiation.* I find nothing in the statute which prohibits the settlement of such a past due claim, especially if the amount paid in settlement is at least equal to the unpaid overtime com-

pensation." (Emphasis supplied). See also Sissel vs. Great Atlantic & Pacific Tea Company, 37 Fed. Sup. 913.

7.

CASES RELIED ON BY RESPONDENTS DISTINGUISHED

The only authorities cited in the majority opinion are: Tennessee Coal Co. vs. Muscoda Local, 321 U.S. 590; Guess vs. Montague, 140 Fed. (2d) 500; Seneca Coal & Coke Co. vs. Lofton, 136 Fed. (2d) 359; Overnight Motor Company vs. Missell, 316 U.S. 572. None of the authorities cited support the ruling made. The Tennessee Coal case involved only the question of "portal to portal" pay; the Overnight Motor case dealt only with the right to overtime of an employee working irregular hours; and in Guess vs. Montague, and the Seneca Coal case, there was no question of a bona fide controversy between the parties.

In some of the cases on which respondents rely will be found isolated comments and dicta which, taken alone, appear to give some support to their contentions, but when these cases are considered in their entirety the distinction is obvious. On careful examination, it will be found that in none of them was there a bona fide controversy of law and fact existing between the parties. Though, as petitioner contends, no Circuit Court has decided the exact question here presented, the decisions dealing with the defense of accord and satisfaction under the Fair Labor Standards Act are conflicting and confusing.

> "As to the appellants claim of accord and satisfaction, we are not now required to choose between the conflicting view of other Circuit Courts of Appeal. See Fleming vs. Warshawsky & Co. 7 Cir. 123 Fed. 2d 622; Guess vs. Montague, 4 Cir., Sept. 16, 1943, 140 Fed. 2d 500." Rigopoulos vs. Kervan, 140 Fed. 2d 506-507-8.

In Rigopoulos vs. Kervan, 47 Fed. Sup. 576, the District Court struck a plea of accord and satisfaction, stating that *no facts were pleaded to show an honest dispute between the parties, and that in the absence of such allegation, the defense of accord and satisfaction was insufficient.* On appeal, the Circuit Court in the decision reported in 140 Fed. (2d) 506 affirmed the trial court and said "There was nothing in dispute between the parties at the time the defendant made his payments; hence there was no consideration for an accord even at common law."

In Fleming vs. Warshawsky, (C.C.A. 7) 123 Fed. (2d) 622, it appears that the administrator and the defendant stipulated to enter a consent judgment enjoining the defendant from violations and providing that he should pay his employees certain amounts. The defendant company failed to comply and was cited for contempt and defended the contempt action on the ground that "without solicitation or other effort on their part, or any one authorized by them in that behalf, certain employees * * * voluntarily and without coercion relinquished their said claims." Here, then, the employees simply signed a voluntary waiver or release upon no consideration whatever and without any controversy existing.

Likewise, in Guess vs. Montague (C.C.A. 4) 140 Fed. (2d) 500, it affirmatively appears that there was no bona fide dispute. The court said (p. 505) "These plaintiffs had two claims, one for the balance of the minimum wages and overtime compensation fixed by law, the other for liquidated damages in a like amount. There was doubt in the mind of the defendant as to his liability for either and *plaintiffs were not then even claiming that he was liable for either.*" (Emphasis supplied)

In Birbalas vs. Cuneo Printing Industries, Inc. (C.C.A. 7) 140 Fed. (2d) 826, the court expressly stated that there was no evidence of an existing bona fide dispute.

CONCLUSION

That the question be answered authoritatively is important to the public. It is important to business generally and especially to that ever increasing part of the business world engaged in interstate commerce or the production of goods therefor.

It is important to the Courts and to the Administrator of the Wage-Hour Division of the Department of Labor. They should know whether they may lawfully permit honest settlements when both litigants want to settle or if they must require every disputed claim to be litigated to final judgment.

Most of all, it is important in the interest of fair and honest dealing and the public morals. Shall contracts continue to be binding or have they become only "scraps of paper"? Was it the intention of Congress "to drive so wide a breach between law and morals"? Gangi v. Schulte, supra.

All concerned — and they are many — should know the answer.

WHEREFORE, it is respectfully submitted that the petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted.

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APPENDIX

Pertinent provisions of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, 29 U.S.C. Section 201, et seq.) read as follows:

"Sec. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates * * * "

"Sec. 7 (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section, * * *

unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed.

"Sec. 16 (b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situ-

ated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

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NO. 922

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OCTOBER TERM, 1944

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PETITION FOR REHEARING

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A. BROUGHTON, CLIFFORD BURDETT, CLAUDE COOPER, ASBURY CRITTLE, WILLIAM HANKS, JAMES JACKSON, L. P. KELLY, RUFUS McCRARY, ROY REESE, HARVEY ROLAND, FRED WHEELER, CLEVELAND HARRIS, CLARENCE MALLORY, ELCO SMITH, ROY TRIBBLE, JAMES TOBIE SMITH AND WILLIE PITTS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR REHEARING

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now ATLANTIC COMPANY, the above named petitioner, and presents this, its petition for a rehearing of the petition for writ of certiorari in this case.

I.

JURISDICTION

The petition for writ of certiorari was filed February 5, 1945; and was denied on April 23, 1945. This petition for rehearing is filed within less than twenty-five days thereafter, pursuant to the provisions of Rule 33.

II.

REASONS FOR PETITION FOR REHEARING

In Brooklyn Savings Bank vs. O'Neil, No. 445, and Dize Box Co. vs. Maddrix, No. 554, decided April 9, 1945, (unreported), involving the validity of releases of claims for unpaid minimum wages, overtime compensation and liquidated damages arising under the Fair Labor Standards Act, this Court held that such releases were invalid where there was no bona fide dispute with respect to coverage or the amount due under the Act.

In Dize vs. Maddrix, No. 554, this Court expressly pointed out that no dispute of any kind existed between the parties at the time the release was executed. This Court said:

> "Both parties knew at this time that more than $500 was due to respondent for minimum wages and overtime pay under the Act."

The Court further commented:

> "In the latter case (No. 554) both the Federal District Court and the Circuit Court of Appeals found 'that both parties knew more than $500.00 was due * * *' at the time the petitioner tendered $500 to the respondent in return for a comprehensive release covering all of the respondent's claims against the petitioner employer."

In Brooklyn Savings Bank vs. O'Neil, No. 445, the Court stated that a preliminary question arose as to whether the release "was given in settlement of a bona fide dispute between the parties with respect to *coverage or amount due under the* ***Act,*** **or whether it constituted a mere waiver of his right to** liquidated damages." (Emphasis supplied).

This Court then made the following finding from the evidence:

> "We think the record in this case shows that the release **was not given in settlement of a bona fide dispute between** employer and employee."

That this Court intended to leave open for future decision the exact question presented in the case at bar is clearly shown by the following significant language of this Court, to wit:

> "Our decision of the issues raised in No. 445 and No. 554 has not necessitated a determination of what limitation, if any, Section 16 (b) of the Act places on the validity of agreements between an employer and employee to settle claims arising under the Act if the settlement is made as the result of a bona fide dispute between the two parties, in consideration of a bona fide compromise and settlement. Neither of the above mentioned cases presented such issues for our consideration."

The controlling question presented by the petition for certiorari in this case, which was expressly left undecided in Brooklyn Savings Bank vs. O'Neil, No. 445, and Dize Box Co. vs. Maddrix, No. 554, is:

Where a bona fide dispute exists between an employer and an employee as to the amount, if any, of unpaid wages and overtime compensation due or claimed to be due under the

Fair Labor Standards Act of 1938 (29 USC 201, et seq.), the dispute relating entirely to past transactions and involving both a question of law as to whether the work done by the employees brings them within the coverage of the Act, and also a question of fact as to the number of overtime hours worked by the employees, may the parties, in order to avoid litigation, settle their differences by a bona fide agreement of accord and satisfaction?

In the case at bar a jury trial was demanded; and the Circuit Court of Appeals, in the decision under review, made the following determination:

> "The evidence as to whether a bona fide dispute existed between the parties, upon the question of what wages remained due and unpaid to each employee with whom the settlements were made, and as to whether such settlements were accepted in final and complete adjustment of that dispute, was conflicting. These issues of fact were submitted to the jury, but the jury was unable to agree upon a verdict, and was dicharged. The judgments appealed from were entered upon a renewed motion for a directed verdict under Rule 50 of the Federal Rules of Civil Procedure. *Therefore, these questions of fact remain unanswered in the record before us.*" (Emphasis supplied).

There was also a bona fide dispute between the parties involving a question of law as to whether the nature of the work done by the employees brought them within the coverage of the Act, and the "ascertained balance" remaining due as wages, referred to by the Circuit Court of Appeals, was unknown, uncertain, and was not ascertained when the settlements were made. Coverage was always in dispute.

III.

PUBLIC IMPORTANCE OF THE CONTROLLING QUESTION

The public importance of the question presented is stated in the petition for writ of certiorari, and this importance is accentuated since the recent decisions in Brooklyn Savings Bank vs. O'Neil and Dize vs. Maddrix. In those cases questions of public importance are decided, but the question presented in this petition for certiorari, which is of equal importance, is left undecided, bringing about doubt, uncertainty and confusion that will perplex the courts and litigants, and will make dubious instead of clarify the administration of the Act. A determination of the question presented in this case will supplement the two decisions so recently rendered and will be a definite and proper guide to those who must live under, as well as to those who must administer the Act. For the foregoing reasons, petitioner respectfully urges that a rehearing be granted; and that, upon further consideration, the order of April 23, 1945, denying the petition for certiorari be revoked, and that the writ of certiorari issue.

HUGHES SPALDING,
JOHN A. SIBLEY,
SUMTER M. KELLEY,
WILLIAM K. MEADOW,
Attorneys for Petitioner.

Of Counsel:

SPALDING, SIBLEY & TROUTMAN,
434 Trust Company of Georgia Building,
Atlanta 3, Georgia.

I, William K. Meadow, counsel for the above named petitioner, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

This 30 day of April, 1945.

William K. Meadow

Attorney for Petitioner

Office - Supreme Court, U. S.
MAY 2 1945
CHARLES ELMORE CROPLEY
CLERK

NO. 923

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OCTOBER TERM, 1944

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vs.

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